Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

DAVID L. UPCHURCH,

Petitioner,

v.

L.E. BRUCE, ET AL., Warden, Hutchinson Correctional Facility; CARLA STOVALL, Kansas Attorney General,

Respondents.

On Petition For Writ Of Certiorari To The Kansas Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Tenth Circuit Court of Appeals err in reversing the District Court's grant of habeas relief to Petitioner based on 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act despite the State Court's misconstruction and complete lack of analysis of Petitioner's ineffective assistance of appellate counsel claim.

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding are contained in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeals for the Tenth Circuit decided and filed June 18, 2003, request for rehearing denied July 15, 2003. *See David L. Upchurch v. L.E. Bruce, et al.* (10th Cir., June 18, 2003) (No. 01-CV-3196-DES).

OPINION BELOW

The opinion below, *David L. Upchurch v. L.E. Bruce, et al.* (10th Cir., June 18, 2003) (No. 01-CV-3196-DES) is attached as Appendix A.

JURISDICTION

The opinion of the Court of Appeals, (Appendix A) was decided on June 18, 2003, and Petitioner's request for rehearing was denied on July 15, 2003. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution guarantees a Defendant the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). 28 U.S.C. § 2254 allows a person in custody to a judgment of a State Court to file a Writ of Habeas Corpus to the Federal Courts for a determination

of whether such custody is a violation of the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceeding and Disposition in the Court Below

A Complaint/Information was filed in Sedgwick County District Court, Kansas, charging Petitioner with one count of aggravated burglary, two counts of aggravated robbery and one count of aggravated kidnapping on October 17, 1995. A subsequent Information was filed on November 27, 1995, charging Petitioner with an additional count of aggravated kidnapping. Petitioner's case proceeded to trial and he was convicted on all counts on February 28, 1996.

Petitioner appealed his convictions to the Kansas Court of Appeals and his convictions were affirmed on February 13, 1998. A petition for review was filed with the Kansas Supreme Court and was denied on April 28, 1998. Subsequently, Petitioner filed a state habeas corpus action pursuant to Kansas Statutes Annotated § 60-1507, claiming for the first time, ineffective assistance of counsel. The district court denied Petitioner's motion on May 12, 1999.

Petitioner appealed the denial of his motion pursuant to K.S.A. § 60-1507, on May 25, 1999. The Kansas Court of Appeals denied Petitioner's appeal on December 22, 2000. The Kansas Supreme Court denied review on March 20, 2001. On May 16, 2001, Petitioner filed a petition for habeas relief in the United States District Court for the District of Kansas.

Petitioner's petition for habeas relief was granted on June 5, 2002. (Copy of decision attached as appendix B.) The United States District Court found that Petitioner had received the ineffective assistance of appellate counsel. The State of Kansas appeals the District Court's ruling to the Tenth Circuit Court of Appeals. The District Court's ruling in favor of Respondent was reversed by the Tenth Circuit Court of Appeals in a decision issued June 18, 2003. Petitioner filed a motion for rehearing which was denied on July 15, 2003.

B. Statement of the Facts

On Labor Day, 1995, Jessica and Daron Green were robbed at gunpoint inside their home in Wichita, Kansas. (Alpt. App. at 94, 15-152) Daron Green was ordered onto the floor of his home by a co-defendant of Petitioner, Kevin Loggins. (Alpt. App. at 153-54) Jessica Green was confronted by Petitioner and money was demanded from her. (Alpt. App. at 103) Ms. Green told Petitioner that her wallet was in her car. (Alpt. App. at 104) Eventually, Ms. Green was taken outside to her car by Petitioner. (Alpt. App. at 104-105) Ms. Green retrieved her wallet and gave it to Petitioner. (Alpt. App. at 107) After giving Petitioner her wallet, Ms. Green was taken back inside her house. (Alpt. App. at 108)

The State of Kansas charged Petitioner with one count of aggravated burglary, two counts of aggravated robbery and two counts of aggravated kidnapping. Petitioner took his case to trial and was convicted on all counts. (Trial Transcript at 163)

On direct appeal to the Kansas Court of Appeals Petitioner argued: that the trial court erred in refusing to

grant his motion for severance; that a photographic lineup that was used in his case was impermissibly suggestive; that he was denied a fair trial by an impartial jury; the trial court erred in denying his motion for judgment of acquittal and directed verdict; the cumulative errors of the trial court denied him a fair trial; and that the trial court erred in sentencing him because he had another case pending in the Kansas Court of Appeals.

In Petitioner's state habeas proceeding he raised the following issues; that he was denied the effective assistance of trial counsel because trial counsel failed to argue that as a matter of law, his actions did not constitute the crime of aggravated kidnapping; that he was denied the effective assistance of appellate counsel for failing to argue that Petitioner's actions did not constitute the crime of kidnapping; and that he should have received an evidentiary hearing on his motion. Petitioner raised the same issues in his federal habeas action. The United States District Court for the District of Kansas found that Petitioner had received the ineffective assistance of appellate counsel as appellate counsel had failed to raise an issue that was described as a "dead-bang winner." (Appendix B, page 21)

The Tenth Circuit Court of Appeals reversed the District Court's ruling in favor of Petitioner on the grounds that the Antiterrorism and Effective Death Penalty Act ("AEDPA") required Petitioner to show that the Kansas Court of Appeals decision was an unreasonable application of clearly established federal law and Petitioner had failed to prove this point.

REASONS FOR GRANTING THE WRIT

In the present case the Tenth Circuit Court of Appeals has unreasonably applied the standard for reviewing claims of ineffective assistance of appellate counsel. The Kansas Court of Appeals decision was an unreasonable application of the *Strickland* standard in its analysis of Petitioner's claim stating only that Petitioner had raised a sufficiency of the evidence argument on his direct appeal and that Petitioner's co-defendant's case, where Petitioner's current argument was raised and resulted in the reversal of the kidnapping conviction, was unpublished and had no value as precedent. The precedent from this Court is clear, appellate counsel is ineffective when he ignores issues that are clearly stronger than those actually presented. *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000).

The decision by the Kansas Court of Appeals misstates Petitioner's argument as his direct appeal dealt with a sufficiency of the evidence argument based on inconsistencies in the testimony of various state's witnesses. Thus, appellate counsel was asking the appellate court to re-weigh the evidence that was presented to the trial court. Clearly, this was an argument doomed to failure. In contrast, Petitioner presented an argument that as a matter of law his actions did not constitute the crime of kidnapping. This argument was based on the facts as presented at trial in a light most favorable to the state. Furthermore, this was an argument that the United States District Court for the State of Kansas found to be a "dead-bang winner".

What makes this issue of a matter of such importance to warrant review by this Court is that the Tenth Circuit's

analysis, if allowed to stand, makes any decision by a state court virtually unreviewable and guts any federal habeas review. Literally, the Kansas Court of Appeals cited a Kansas case that mentioned the *Strickland* standard, noted that Petitioner had raised an unrelated argument in his direct appeal and stated that even though Petitioner's co-defendant's kidnapping conviction was reversed on the very same grounds raised by Petitioner, that Petitioner had failed to show his appellate counsel was ineffective. The Kansas Court of Appeals misconstrued the issue raised by Petitioner, ignored his argument and failed to provide even the faintest analysis of its own decision. Not only would it be fundamentally unfair for the Kansas Court of Appeals' decision to be allowed to stand, habeas review of ineffective assistance of counsel issues would be meaningless. The question is whether state courts can adhere to the bare form of the law and ignore its substance and still pass federal habeas review.

ARGUMENT AND AUTHORITIES

The Tenth Circuit reversed the district court's decision to grant Petitioner relief upon his claim that he had received the ineffective assistance of appellate counsel. The basis of the Tenth Circuit's decision was that the Kansas Court of Appeals' rejection of Petitioner's contentions was not an unreasonable application of clearly established Federal law as required under § 2254 of the AEDPA. Specifically, the Tenth Circuit found that it was unclear if Petitioner's actions constituted the crime of kidnapping, as defined by Kansas law, and thus, not compelling to the degree that a rational jury could not have found Petitioner guilty beyond a reasonable doubt. Accordingly, it

was found that Petitioner's appellate counsel was not ineffective for failing to raise the issue of whether Petitioner's acts constituted the crime of kidnapping according to Kansas law. Finally, this Court found that regardless of the merits of Petitioner's contentions the Kansas Court of Appeals' decision to deny him relief was not unreasonable.

Petitioner respectfully contends that the Tenth Circuit ignored the standard for effective appellate counsel, misconstrued Kansas case law and thus, the reasonableness of appellate counsel's failure to raise the issue on direct appeal. Petitioner contends that Kansas case law is quite clear that his actions did not establish the crime of kidnapping through specific examples given in Kansas case law. While Petitioner is mindful of the deference to be given in a habeas review of the state court's ruling on his case, he would note that the federal district court's ruling in his favor actually found his case meritorious on a higher standard than necessary by stating Petitioner's issue was a "dead-bang winner" as opposed to demonstrating a reasonable probability that, but for his counsel's failure to raise the claim, that he would have prevailed on appeal.

Petitioner does concede that the analysis for determining whether a taking or confining of a person constitutes the crime of kidnapping, taken by itself, in a vacuum, does not make it clear if his actions were a kidnapping or not. As stated in *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976), the taking or confining of the victim:

> (a) Must not be slight, inconsequential or merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and

> (c) Must have some significance independent of the other crime that makes the other crime substantially easier of commission or substantially lessens the risk of detection.

This test should not be applied in isolation from explanatory examples given in *Buggs* and precedent from subsequent cases interpreting *Buggs*. The court in *Buggs* specifically stated that the forced direction of a store clerk to cross the store to open a cash register is not a kidnapping. *Id.* at 216. In that example, the victim is being robbed and is forced to retrieve money from a separate location. This is exactly what Petitioner did when he forced Ms. Green to her car to retrieve her wallet. There is no reasonable argument in law or logic that could contradict this conclusion.

Furthermore, in *State v. Fisher*, 257 Kan. 65, 891 P.2d 1065 (1995), the Kansas Supreme Court found that the movement of a store clerk from a cash register to the back of the store in order to retrieve a key for a safe was insufficient to support a conviction for aggravated kidnapping. *Id.* at 1073. Again, no reasonable argument can be made that Petitioner's actions were in any way more egregious than that of Fisher's. It can only be argued that Fisher's actions would be closer to a kidnapping in that it made it easier for Fisher to retrieve the money from its location in a safe. The logic of this argument was specifically rejected by the Kansas Supreme Court.

It should be noted in *Fisher* that as a matter of law, the Kansas Supreme Court found that Fisher's actions did not constitute the crime of kidnapping. In analyzing the merits of Petitioner's arguments the Tenth Circuit used the standard for a claim that there was insufficient evidence to convict Petitioner. This standard being "whether,

after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational fact finder could have found the defendant guilty beyond a reasonable doubt." There is no language in *Fisher* or any other Kansas case using the *Buggs* analysis that applies this standard. The question was not one of fact in *Fisher* or in Petitioner's case. The question was whether the movement of the victim was done to "facilitate" the underlying crime of robbery. In *Buggs* and in *Fisher* the Kansas Supreme Court had no problem in finding that there was insufficient evidence to convict either of the defendants of kidnapping on a legal principle that cannot be distinguished from Petitioner's case.

As this Court recognized, Petitioner's argument that his appellate counsel was ineffective requires that the omitted issue must be viewed in relation to the rest of his appeal and deference should be given to any professional judgment involving its omission. *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003). Petitioner's appellate counsel did make an argument that there was insufficient evidence to convict Petitioner based on inconsistencies within the testimony of various state's witnesses. This argument was recognized for what it was, a request to re-weigh the evidence, something that an appellate court is obviously not allowed to do. Petitioner's argument does not challenge any of the facts as presented by the state. Petitioner instead, asks that his convictions for kidnapping be reversed based on well established case law.

The Tenth Circuit found that the argument raised by Petitioner's appellate counsel was not obviously stronger than the issue presented by Petitioner in his state habeas action. Petitioner forcefully disagrees with this assessment.

The argument made by Petitioner's appellate counsel was doomed before it was ever made. No court in the nation would find such an argument compelling in that Petitioner's counsel was asking the court to do something that it was specifically precluded from doing, re-weighing the evidence presented to the district court. On the other hand, the omitted issue was based on well established case law that had resulted in a number of reversals on extremely similar, if not analytically identical, facts. According to *Strickland*, Petitioner must only be able to prove that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding could have turned out differently. The standard is not that of a "dead-bang winner" or that he would have more probably than not prevailed. Petitioner contends that he has met this standard.

This Tenth Circuit made comment that regardless of whether Petitioner's appellate counsel was objectively deficient that the Kansas Court of Appeals' decision to reject Petitioner's claims could not be found to be unreasonable. Petitioner understands that the Kansas Court of Appeals' decision could be found to be erroneous or incorrect without rising to the standard of unreasonableness. Petitioner worries, however, that a state court's findings can be viewed as virtually unreviewable as long as *Strickland* is referred to in some fashion and no analysis is made by the state court. Petitioner further notes that the Kansas Court of Appeals was found to be unreasonable by the Federal District Court in regards to Petitioner's claims that his counsel was ineffective for failing to argue that his actions in regards to Daron Green were not a kidnapping. The state did not appeal this issue and thus, has not challenged it. Petitioner contends that his actions towards

Jessica Green were just as clearly not a kidnapping as his actions towards Daron Green. In both instances the acts involved corresponded directly to examples and precedent from Kansas case law. Regardless of any argument or ruling that has been made it was found that the Kansas Court of Appeals was found to be unreasonable based on arguments that Petitioner's appellate counsel was ineffective.

CONCLUSION

Petitioner did receive the ineffective assistance of appellate counsel. Petitioner's appellate counsel failed to raise an issue that is evident from Kansas case law and had resulted in the reversal of a kidnapping conviction of Petitioner's codefendant. The issues that were raised were weak and plainly inferior to the claim presented on habeas review. The Kansas Court of Appeals failed to differentiate between Petitioner's claims on direct appeal and those presented on appellate review, failed to provide even a cursory analysis of its own decision to deny Petitioner relief, and apparently is comfortable with coming to differing rulings based on the same set of facts.

The Federal District Court in Kansas correctly found that Petitioner had received the ineffective assistance of appellate counsel based on the omission of an argument described as a "dead-bang winner." The Tenth Circuit's deference to the state court's ruling effectively guts any habeas relief sought from state court decisions. To allow the Tenth Circuit's decision to stand would be fundamentally unfair to Petitioner and would allow state courts to

disregard the standards of *Strickland* as long as the magic word "*Strickland*" is somehow alluded to in a decision.

WHEREFORE, Petitioner Upchurch respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari and allow him to submit a Brief on the Merits of his case.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DAVID L. UPCHURCH, Petitioner-Appellee, v. L.E. BRUCE, Warden, Hutchinson Correctional Facility; CARLA STOVALL, Kansas Attorney General, Respondents-Appellants.	No. 02-3242

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 01-CV-3196-DES)

(Filed Jun. 18, 2003)

John K. Bork, Assistant Attorney General (Jared S. Maag, Assistant Attorney General on the briefs), Topeka, Kansas for the Respondents-Appellants.

Gary W. Owens, Roger L. Falk & Associates, P.A., Wichita, Kansas for the Petitioner-Appellee.

Before **LUCERO**, **McWILLIAMS**, and **ANDERSON**, Circuit Judges.

LUCERO, Circuit Judge.

In this habeas case, the district court granted relief to petitioner David Upchurch on the basis that his appellate counsel failed to mount an adequate challenge to his kidnapping charge. On appeal, we consider whether the Kansas Court of Appeals' ("KCOA's") decision denying post-conviction relief constituted an unreasonable application of *Strickland v. Washington,* 366 U.S. 668 (1984). We exercise jurisdiction pursuant to 28 U.S.C. § 2253, and reverse the district court's grant of habeas relief.

I

Around midnight on Labor Day in 1995, Jessica Green was preparing for bed when she heard a knock at the front door. Kevin Loggins and an unknown male asked to speak with Green's husband Daron. Recognizing Loggins from a previous encounter, Green invited the two men inside and returned to the bathroom. Loggins then pointed a gun at Green's husband, ordering him onto the floor and demanding money and certain property. At some point, the unknown male let Upchurch into the house. As Green entered the living room, Loggins pointed the gun at her and directed Upchurch to accompany her to the bedroom. Upchurch demanded that she give him all her money and, when Green explained that she had none, threatened, "If you don't give me your money, I'm going to kill you." (Appellant's App. at 103.) Green informed Upchurch that her wallet was outside in her car. Upchurch started to exit the room, ostensibly to find Green's wallet, only to turn around, grab Green by her collar, and pull her outside. As they approached the car, Green noticed that one of

Upchurch's cohorts was already inside the car stealing the car stereo system. Ordered to find her wallet, Green was able to do so and handed it to Upchurch.[1]

Upchurch was charged with and convicted of one count of aggravated burglary, two counts of aggravated robbery, and two counts of aggravated kidnapping, and sentenced to 442 months' imprisonment. On direct appeal of his conviction, Upchurch raised numerous claimed errors, including an unsuccessful challenge to the sufficiency of the evidence in support of his convictions for the kidnapping of Jessica and Daron Green. He argued that inconsistencies in the testimony made it impossible to establish guilt beyond a reasonable doubt. Upchurch's counsel did not argue that his client's alleged actions failed to satisfy the elements of aggravated kidnapping under Kansas law. Following the KCOA's rejection of his direct appeal, Upchurch filed a petition for state post-conviction relief, claiming that his appellate counsel was constitutionally ineffective for having failed to argue the elements of aggravated kidnapping under state law. The petition was denied by the KCOA.

In a 28 U.S.C. § 2254 petition, Upchurch presented to the district court the same ineffective-assistance-of-appellate-counsel argument with respect to the kidnapping charges that he raised in his petition for state post-conviction relief. In granting habeas relief, the district court concluded that Upchurch's appellate counsel's failure

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[1] In the process of doing so, Green was sexually abused by a third person; that event is only tangentially relevant and we do not develop those facts further.

to argue that Upchurch's actions did not satisfy the elements of aggravated kidnapping constituted "the omission of a dead-bang winner" that would have resulted in reversal on appeal. *Upchurch v. Bruce,* No. 01-3196-DES, slip op. at 2 (D. Kan. June 5, 2002). Kansas appeals, contending that the KCOA's denial of habeas relief on Upchurch's ineffective-assistance-of-appellate-counsel claim as it relates to the kidnapping of Jessica Green did not constitute an unreasonable application of *Strickland.*[2]

II

Upchurch filed his federal habeas petition on May 16, 2001, and therefore the Antiterrorism and Effective Death Penalty Act ("AEDPA") governs our review. *See Paxton v. Ward,* 199 F.3d 1197, 1204 (10th Cir. 1999) (stating that AEDPA applies to habeas petitions filed after April 24, 1996, regardless of the date of the criminal trial forming the basis of the conviction). Section 2254, as amended by AEDPA, provides that a writ of habeas corpus may not be issued with respect to any claim adjudicated on the merits in state court unless that adjudication resulted in a decision:

> (1) . . . that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

---

[2] Kansas does not appeal the district court's grant of habeas relief with respect to the kidnapping of Daron Green.

> (2) . . . that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§ 2254(d)(1)-(2). Under the "contrary to" clause, federal habeas courts may issue the writ only "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Court] has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 413 (2000). Under the "unreasonable application" clause, a federal court may grant habeas relief only "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411; *see also Lockyer v. Andrade,* 123 S. Ct. 1166, 1175 (2003) (holding that "objectively unreasonable" analysis under § 2254(d)(1) is also different from "clear error" review).

Upchurch's claim regarding appellate counsel ineffectiveness is governed by the Supreme Court's decision in *Strickland v. Washington,* 466 U.S. 668 (1984), which was clearly established at the time his state-court conviction became final. *See Williams,* 529 U.S. at 390-91 (concluding that *Strickland* qualifies as clearly established federal law under AEDPA even though the test, by necessity, requires a case-by-case examination of the evidence); *see also Cargle v. Mullin,* 317 F.3d 1196, 1202 (10th Cir. 2003) ("The proper standard for assessing a claim of ineffectiveness of appellate

counsel is that set forth in *Strickland v. Washington.*"). Under *Strickland,* two prongs must be satisfied to show ineffective assistance of counsel in violation of the Sixth Amendment:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. To establish the first component – deficient performance – a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To establish the second component – prejudice – a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Claims of appellate-counsel ineffectiveness are often based on counsel's failure to raise a particular issue on appeal. *See Cargle,* 317 F.3d at 1202. "[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins,* 528 U.S. 259, 288 (2000) (citing *Jones v. Barnes,* 463 U.S. 745 (1983)). Although it is possible to bring a *Strickland* claim based on counsel's failure to raise a particular issue, "it is difficult to demonstrate that

counsel was incompetent." *Id.* In order to evaluate appellate counsel's performance, "we look to the merits of the omitted issue." *Cargle,* 317 F.3d at 1202 (quotation omitted). "If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance. . . . " *Id.* On the other hand, if the omitted issue "has merit but is not so compelling, . . . [we must assess] . . . the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance."[3] *Id.* (citing *Smith,* 528 U.S. at 288).

In ruling on Upchurch's claim, the KCOA determined that Upchurch's counsel was not objectively deficient under the first prong of *Strickland.*[4] Because the KCOA adjudicated the merits[5] of Upchurch's claim under the

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[3] In *Neill v. Gibson,* 278 F.3d 1044 (10th Cir. 2001), *cert. denied,* 123 S. Ct. 145 (2002), we rejected the proposition that omission of a "dead bang winner" is *necessary* to prevail on a claim of ineffective assistance of appellate counsel. *Id.* at 1057 n.5. At the same time, of course, omission of a "dead bang winner" can be a *sufficient* basis for such a claim. *Cargle,* 317 F.3d at 1202 n.4.

[4] Although the KCOA did not cite to *Strickland,* it utilized the Kansas standard for ineffective-assistance-of-counsel claims, laid out in *Baker v. State,* 755 P.2d 493 (Kan. 1988). *Baker* mirrors the *Strickland* standard. *See* 755 P.2d at 498. Neither party contends that the KCOA's decision was "contrary to" *Strickland* under § 2254(d)(1). *See also Early v. Packer,* 123 S. Ct. 362, 365 (2003) (explaining that failure to cite to Supreme Court law does not automatically result in a decision that is "contrary to" established federal law under AEDPA).

[5] It is unclear from the KCOA's decision denying Upchurch post-conviction relief on his ineffectiveness claim whether the court determined

(Continued on following page)

correct legal standard, this case turns on whether the KCOA's ultimate disposition was an unreasonable application of *Strickland*. *See Aycox,* 196 F.3d at 1178; *see also Eze v. Senkowski,* 321 F.3d 110, 125 (2d Cir. 2003) ("[W]hen a state court fails to articulate the rationale underlying its rejection of a petitioner's claim, and when that rejection is on the merits, the federal court will focus its review on whether the state court's ultimate decision was an 'unreasonable application' of clearly established Supreme Court precedent." (quotation omitted)).

III

We proceed to inquire whether the KCOA's application of *Strickland* was objectively unreasonable under § 2254(d)(1). Upchurch's contention is that, although his appellate counsel challenged the sufficiency of the evidence

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(1) that Upchurch's counsel was not deficient for failing to challenge Upchurch's conviction under Kansas law, or (2) that Upchurch's counsel on direct appeal was not deficient because counsel *did* assert that Upchurch's actions did not constitute aggravated kidnapping under Kansas law insofar as counsel broadly challenged the sufficiency of the evidence. Notwithstanding the cryptic nature of the KCOA's decision, however, it is well-settled in this circuit that it amounts to a decision "on the merits" for AEDPA purposes. *See Aycox v. Lytle,* 196 F.3d 1174, 1177 (10th Cir. 1999) (holding that there is an adjudication "on the merits" in the absence of evidence that the state court did not consider and reach the merits of petitioner's claims). "We owe deference to the state court's *result,* even if its reasoning is not expressly stated." *Id.*; *see also Neill,* 278 F.3d at 1058 n.6 (noting that "this court still defers to the state appellate court's decision denying relief, even though that court did not expressly state its reasoning on each specific claim"). Thus, it is the KCOA's result – denying Upchurch's claim on the basis that he did not establish deficient performance by his appellate counsel – to which we owe deference.

to support Upchurch's conviction for aggravated kidnapping based on inconsistencies in witness testimony, counsel was deficient for not arguing that there was insufficient evidence for the jury to convict Upchurch because Upchurch's actions in transporting Green outside to retrieve her wallet did not satisfy the elements of kidnapping under Kansas law. In order to evaluate Upchurch's counsel's performance under *Strickland,* "we look to the merits of the omitted issue." *Cargle,* 317 F.3d at 1202.

In evaluating the sufficiency of the evidence in a criminal case, the Kansas courts determine "whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Jamison,* 7 P.3d 1204, 1211 (Kan. 2000). Kansas defines kidnapping as follows:

> Kidnapping is the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person:
>
> (a) For ransom, or as a shield or hostage;
>
> (b) to facilitate flight or the commission of any crime;
>
> (c) to inflict bodily injury or to terrorize the victim or another; or
>
> (d) to interfere with the performance of any governmental or political function.

K.S.A. § 21-3420. Aggravated kidnapping requires proof that "bodily harm is inflicted upon the person kidnapped." § 21-3421. At trial, the state argued that Upchurch committed the aggravated kidnapping of Green under § 21-3420(b),

because he moved her outside to facilitate the commission of the crime of robbery.

In *State v. Buggs*, 547 P.2d 720, 730 (Kan. 1976), the Kansas Supreme Court held that the Kansas kidnapping statute "requir[es] no particular distance of removal, nor any particular time or place of confinement." Describing subsection (b), the court held that "a taking is a kidnapping if its purpose is to 'facilitate' the commission of any crime, even if the crime facilitated be a less serious crime such as robbery or rape." *Id.* To facilitate the commission of a crime "means something more than just to make more convenient" and "must have some significant bearing on making the commission of the crime 'easier' as, for example, by lessening the risk of detection." *Id.* "Whether a taking substantially 'facilitates' another crime or whether it is 'merely incidental' are two different things." *Id.* at 731. *Buggs* set forth a three-part test to determine whether a taking or confinement is done to facilitate the commission of a crime:

> [I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Id.

In *Buggs,* the defendant accosted two Dairy Queen employees in the parking lot after they had closed the store, directed the victims to unlock the door, and forced them inside, where he raped one of the victims and robbed the store. The court concluded that the defendant's actions constituted kidnapping because the movement of the victims into the store substantially reduced the risk of detection of both the robbery and the rape. *Id.; see also State v. Alires,* 792 P.2d 1019, 1022 (Kan. 1990) (concluding that the defendant committed kidnapping when he forced the victim of a convenience-store robbery out of the store to conceal the fact that a robbery was in progress); *State v. Turbeville,* 686 P.2d 138, 145 (Kan. 1984) (finding a kidnapping where the defendant moved victims from the front display area of the store to an office in the rear of the store before committing attempted murder).

By contrast, in *State v. Fisher,* 891 P.2d 1065, 1073 (Kan. 1995), the Kansas Supreme Court concluded that the defendant's actions did *not* constitute kidnapping. Fisher, while robbing a restaurant, moved two victims to the back office to obtain a key to the safe. Reversing the defendant's conviction for kidnapping, the court concluded that the movement of the victims "neither made the crime substantially easier . . . nor did it substantially lessen the risk of detection." *Id.* Because the defendant moved the victims out of mere convenience – i.e., the victims knew where the key to the safe was located, and the movement did not lessen the risk of detection – the court concluded that the defendant's actions were "no different from the forced direction of a store clerk to cross the store to open a cash register," which the *Buggs* court explicitly described as not kidnapping. *Id.* (quotation omitted). Similarly, in *State v. Kemp,* 46 P.3d 31, 34 (Kan. Ct. App. 2002), the

Kansas Court of Appeals held that a kidnapping did not occur where the defendant moved a robbery victim down a hallway to a central location, where other victims were confined. "Moving all victims to a central location before commencing the gathering of their property appears to be a matter of convenience rather than an act which makes the robbery substantially easier to effect or which lessens the risk of detection." *Id.*

The state argues that Upchurch's actions constituted kidnapping because, as in *Buggs,* moving Green outside was not inherent in the crime of robbery and made it substantially easier for Upchurch to commit the robbery.[6] In response, Upchurch asserts that, like the defendants in *Fisher* and *Kemp,* his actions merely made the robbery more convenient and, unlike the actions of the defendant in *Buggs,* his actions increased, rather than decreased, the risk of detection of the robbery. Upchurch argues that his actions resemble the forced direction of a store clerk to open a cash register, and thus he did not commit aggravated kidnapping. He asserts that there was no purpose in

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[6] The state also emphasizes the fact that, when the district court reviewed Upchurch's co-defendant Loggins's § 2254 motion, the court concluded in a footnote that "a reasonable fact-finder could have found beyond a reasonable doubt that [Loggins] was guilty of aggravated kidnapping. Green was taken by force from her home to her vehicle to locate her wallet so that robbers could deprive her of her property." (Appellant's Br. at 18 (quoting *Loggins v. Hannigan,* No. 99-3102-DES, slip op. at 11-12 n.2 (D. Kan. Sept. 11, 2001))). The statement indicates that the district court contradicted itself by granting Upchurch habeas relief on this ground, argues the state. We conclude that this statement by the district court was dicta, because Loggins did not make a claim of ineffective assistance of appellate counsel in his petition for habeas relief. Accordingly, we do not rely on this statement.

moving Green outside that is distinct from committing the underlying robbery, and thus the taking or confinement of Green did not "facilitate" the robbery under the Kansas statute and applicable case law. Failure of his counsel on direct appeal to make this argument, contends Upchurch, was objectively deficient.

In our analysis, whether Upchurch's actions constituted kidnapping under Kansas law is unclear, and claiming on direct appeal that there was insufficient evidence for a rational jury to convict Upchurch would not have been plainly meritorious. As discussed above, Kansas case law exemplifies the difficulty in differentiating between a taking or confining that "facilitates" the commission of another crime versus conduct that is merely incidental to the commission of another crime. While an argument that Upchurch's actions did not constitute kidnapping under Kansas law may have merit, we are not persuaded that it is compelling to a degree that a rational jury could not have found Upchurch guilty beyond a reasonable doubt. In this situation, we must view this omitted issue in relation to the rest of the appeal and give deference to any professional judgment involved in its omission. *Cargle,* 317 F.3d at 1202.

Consistent with Upchurch's alibi defense at trial, counsel on direct appeal included the argument that inconsistencies in witness testimony resulted in insufficient evidence of Upchurch's guilt. Rather than simply asking the KCOA to reweigh the credibility of witness testimony, counsel could have argued *both* that Upchurch was not present at the crime scene *and* that, even if the jury believed the evidence presented by the state, a rational jury could not have found that Upchurch's actions constituted kidnapping under Kansas law. However, we

are not persuaded that the omitted argument is obviously stronger than the issue counsel did raise so as to render counsel's performance "objectively unreasonable" under *Strickland.* Cognizant of the Supreme Court's mandate that "[j]udicial scrutiny of counsel's performance must be highly deferential" and "every effort be made to eliminate the distorting effects of hindsight," *Strickland,* 466 U.S. at 689, we are left with substantial reservations that preclude a conclusion that Upchurch's appellate counsel was constitutionally ineffective.

Even were we to conclude that Upchurch's counsel provided objectively deficient assistance, we cannot say that the KCOA's decision to the contrary was unreasonable.[7] As the Supreme Court has iterated time and again, "a federal habeas court may not issue the writ simply

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[7] Although the district court did not explicitly state that the KCOA's decision was unreasonable, the court did cite the correct AEDPA standard at the beginning of its order and thus implicitly decided that the state court's application of *Strickland* was unreasonable. Indeed, in subsequently denying the state's motion to file a motion for reconsideration out of time, the court described its earlier decision in the following way:

> In granting petitioner habeas relief, the court found that the Kansas Court of Appeals ("KCOA") unreasonably applied the test found in *Strickland v. Washington* . . . as it applies to ineffective assistance of appellate counsel. Specifically, the court found that petitioner's appellate counsel's failure to properly challenge petitioner's convictions for aggravated kidnaping was an omission of a 'dead-bang winner,' resulting in ineffective assistance of appellate counsel. The KCOA's failure to recognize this was found to be an unreasonable application of *Strickland.*

Upchurch v. Bruce, No. 01-3196-DES, slip op. at 2 (D. Kan. Aug. 7, 2002). Therefore, we conclude that the district court applied the correct AEDPA analysis.

because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams,* 529 U.S. at 409. Constrained by AEDPA's deferential standard of review, we hold that it was not unreasonable for the KCOA to conclude that Upchurch received effective assistance of appellate counsel. Given the Kansas kidnapping statute and relevant case law, it is not entirely clear whether Upchurch's actions facilitated the robbery, or merely made it more convenient; Upchurch's argument that a rational jury could not have concluded that he committed the offense of kidnapping is far from compelling. Because the KCOA's decision was not an unreasonable application of *Strickland,* Upchurch is not entitled to habeas relief.

IV

For the foregoing reasons, we **REVERSE** the judgment of the district court granting Upchurch habeas relief.

APPENDIX B

IN THE EIGHTEENTH JUDICIAL DISTRICT DISTRICT COURT, SEDGWICK COUNTY, KANSAS CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 95 CR 1859
KEVIN D. LOGGINS and DAVID L. UPCHURCH, Defendants.	)	

VERDICT

(Filed Mar. 4, 1996)

We, the Jury, do upon our oath or affirmation, unanimously find the defendant, David L. Upchurch, as follows:

Count 1: X Guilty of Aggravated Burglary
___ Not Guilty

Count 2: X Guilty of Aggravated Robbery of Felix Green
___ Not Guilty

Count 3: X Guilty of Aggravated Robbery of Jessica Green
___ Not Guilty

Count 4: X Guilty of Aggravated Kidnapping of Jessica Green
___ Not Guilty

Count 7: X Guilty of Aggravated Kidnapping of Felix Green
___ Not Guilty

Dated this 28 day of February, 1996.

[SEAL] /s/ [Illegible]
Presiding Juror

IN THE EIGHTEENTH JUDICIAL DISTRICT DISTRICT COURT, SEDGWICK COUNTY, KANSAS CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 95 CR 1859
KEVIN D. LOGGINS and DAVID L. UPCHURCH, Defendants.	)	

VERDICT

(Filed Mar. 4, 1996)

We, the Jury, do upon our oath or affirmation, unanimously find the defendant, Kevin D. Loggins as follows:

Count 1: X Guilty of Aggravated Burglary
___ Not Guilty

Count 2: X Guilty of Aggravated Robbery of Felix Green
___ Not Guilty

Count 3: X Guilty of Aggravated Robbery of Jessica Green
___ Not Guilty

Count 4: X Guilty of Aggravated Kidnapping of Jessica Green
___ Not Guilty

Count 5: X Guilty of Criminal Possession of a Firearm
___ Not Guilty

Count 6: X Guilty of Aggravated Sexual Battery
___ Not Guilty

Count 7: X Guilty of Aggravated Kidnapping of Felix Green
___ Not Guilty

Dated this 28 day of February, 1996.

[SEAL] /s/ [Illegible]
Presiding Juror

IN THE EIGHTEEN JUDICIAL DISTRICT
DISTRICT COURT,
SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT PAGE 1

STATE OF KANSAS
PLAINTIFF

(Filed Mar. 4, 1996)

VS

DAVID L. UPCHURCH
(In Custody) *DEFENDANT*

CASE NO. 95 CR 1859

RECORD OF TRIAL OR PLEA

On this 26th day of February, 1996, this matter comes on for ☒x trial ☐ plea, defendant being present in person and by counsel Michael Barbara.

State being present by counsel David Kaufman.

TRIAL

Thereupon, the case proceeds to ☒x Jury Trial ☐ Bench Trial, and after hearing all of the evidence and statements of counsel, a verdict is returned on February 28, 1996, finding the defendant:

Count One Agg. Burglary SL5 Person ☒ Guilty ☐ Not Guilty

Count Two Agg. Robbery SL3 Person ☒ Guilty ☐ Not Guilty

Count Three Agg. Robbery SL3 Person ☒ Guilty ☐ Not Guilty

or: The Court Declares a ☐ Mistrial

PLEA:

The defendant announces that he pleads ☐ Guilty ☐ Nolo Contendere to:

Count One _____

Count Two _____

Count Three _____

P.S.I. The Court orders a presentence investigation to be made, and schedules sentencing for April 18, 1996, at 1:30, P.M.

/s/ Rebecca Pelshaw

Judge, Div. 14

[SEAL]

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT,
SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT PAGE 2

STATE OF KANSAS
PLAINTIFF

(Filed Mar. 4, 1996)

VS

DAVID L. UPCHURCH
(In Custody) *DEFENDANT*

CASE NO. 95 CR 1859

RECORD OF TRIAL OR PLEA

On this 26th day of February, 1996, this matter comes on for ☒x trial ☐ plea, defendant being present in person and by counsel Michael Barbara.

State being present by counsel David Kaufman.

TRIAL

Thereupon, the case proceeds to ☒x Jury Trial ☐ Bench Trial, and after hearing all of the evidence and statements of counsel, a verdict is returned on February 28, 1996, finding the defendant:

Count ~~One~~ 4 Agg. Kidnapping SL1 Person ☒ Guilty ☐ Not Guilty

Count ~~Two~~ 7 Agg. Kidnapping SL1 Person ☒ Guilty ☐ Not Guilty

Count Three _____ ☐ Guilty ☐ Not Guilty

or: The Court Declares a ☐ Mistrial

PLEA

The defendant announces that he pleads ☐ Guilty ☐ Nolo Contendere to:

Count One _____

Count Two _____

Count Three _____

P.S.I. The Court orders a presentence investigation to be made, and schedules sentencing for April 18, 1996, at 1:30, P.M.

[SEAL] /s/ Rebecca Pelshaw

Judge, Div. 14

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DAVID L. UPCHURCH, Petitioner, vs. L. E. BRUCE, Warden, Hutchinson Correctional Facility, and CARLA STOVALL, Kansas Attorney General, Respondents.	)	Case No. 01-3196-DES

MEMORANDUM AND ORDER

(Filed June 5, 2002)

This matter is before the court on a petition for habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner appeals his convictions of aggravated kidnaping. Respondents have filed an Answer and Return (Doc. 7), and petitioner has filed a Traverse (Doc. 20). For the following reasons, a writ of habeas corpus will be issued on behalf of petitioner.

I. PROCEDURAL HISTORY

On October 17, 1995, petitioner was charged in the district court of Sedgwick County, Kansas, with one count of aggravated burglary, two counts of aggravated robbery, and one count of aggravated kidnaping. On November 27, 2001, petitioner was charged with an additional count of aggravated kidnaping. On February

28, 1996, petitioner was convicted by a jury on all counts. Petitioner was later sentenced to a controlling term of 442 months in prison.

After being convicted and sentenced, petitioner filed a direct appeal raising the following issues:

I. The trial court abused its discretion by failing to grant petitioner's motion to sever.

II. The photographic lineup was impermissibly suggestive and tainted the in court identification of petitioner by Jessica Green.

III. Petitioner's constitutional rights to a fair trial and an impartial jury were violated resulting in reversible error.

IV. There was sufficient evidence to support finding the petitioner guilty beyond a reasonable doubt.

V. The trial court erred when it declined the petitioner's motion for directed verdict and judgment of acquittal.

VI. Petitioner is entitled to a new trial because the court's cumulative errors prevented him from receiving a fair trial.

VII. The sentence entered in this case was entered in error.

(Traverse at 4).

In an unpublished opinion, the Kansas Court of Appeals ("KCOA") affirmed petitioner's convictions. *State v. Upchurch*, No. 77, 101 (Kan. Ct. App. Feb. 13, 1998). The Kansas Supreme Court denied review.

On January 25, 1999, petitioner filed for state habeas relief pursuant to Kansas Statutes Annotated § 60-1507. The district court denied relief on May 15, 1999. Thereafter, petitioner appealed and the KCOA denied relief. *See Upchurch v. State*, No. 84,059 (Kan. Ct. App. Dec. 22, 2000). On March 20, 2001, he Kansas Supreme Court denied review. On May 16, 2001, petitioner filed the petition for habeas relief, which is currently before the court.

II. FACTUAL BACKGROUND

In September of 1995, when Jessica Green and her husband Felix Daron Green were getting ready for bed, Mrs. Green answered a knock on the door. Kevin Loggins ("Loggins") and an unknown man were at the door. Mrs. Green recognized Loggins, so she invited the men into the house. Shortly after the men arrived, Mr. Green saw two men trying to break into his car. Mr. Green yelled at the men, and Loggins ran toward the men supposedly attempting to scare them away. Mrs. Green witnessed the incident but believing everything to be under control, she returned to the bathroom to continue getting ready for bed. Mr. Green, Loggins, and the other man returned to the inside of the house.

Once the men retired into the house, Loggins pointed a gun at Mr. Green and demanded money and property. The unknown man opened the door to let the men who had attempted to break into the car inside the house. Petitioner was one of those men. Loggins ordered Mr. Green onto the floor. Mrs. Green came out of the bathroom and witnessed her husband being held on the

floor at gunpoint. Loggins pointed the gun at Mrs. Green and petitioner and Mrs. Green went into the bedroom.[1]

While in the bedroom, petitioner demanded money from Mrs. Green. Mrs. Green informed petitioner that her wallet was in the car and that she did not have any money in the house. Petitioner left the bedroom and stepped outside to the car. Mrs. Green also left the bedroom and walked to the doorway to see what was happening outside. As she was looking out the doorway, petitioner opened up the door and grabbed Mrs. Green by the collar, escorting her to the vehicle. Mrs. Green found the wallet in the car and gave it to petitioner. The robbers then left the house.

Mr. and Mrs. Green eventually reported the incident to the police. Mrs. Green identified petitioner from a photographic lineup, but Mr. Green was unable to identify petitioner.

III. PETITIONER'S CLAIMS

Petitioner's claims for habeas relief are as follows:

> I. The evidence is insufficient to support the convictions of aggravated kidnaping and Petitioner did not receive effective assistance of counsel because his trial attorney failed to make any objection or raise this issue in any way at the trial court level. Petitioner was convicted of aggravated kidnaping, when the evidence was

[1] It is unclear from the record whether petitioner took Mrs. Green into the bedroom or whether Mrs. Green went into the bedroom on her own initiative and petitioner followed.

> uncontroverted that Petitioner's actions did not constitute the crime of aggravated kidnaping as a matter of law.
>
> II. Petitioner was denied his Sixth Amendment right to effective assistance of appellant counsel.

(Pet. at 4 and 6).

IV. STANDARD OF REVIEW

Under 28 U.S.C. § 2254, a federal court is precluded from granting habeas relief on any claim adjudicated by a state court, unless the state court's proceeding "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). *See Williams v. Taylor*, 529 U.S. 362, 405-13 (2000) (construing the review standard in 28 U.S.C. § 2254).

A state court's decision is "contrary to" an established federal law if the state court reaches a different result than the Supreme Court would when presented with facts that are "materially indistinguishable from a relevant Supreme Court precedent" or if the state court "applies a rule that contradicts the governing law set forth in Supreme court cases." *Williams*, 529 U.S. at 405.

Additionally, the Supreme Court has clearly dictated that "it is not the province of a federal habeas

court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Federal habeas actions do not provide relief for errors of state law. *See id.* (citing *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)).

V. DISCUSSION

A. Insufficient Evidence

Petitioner claims there was insufficient evidence to support both convictions of aggravated kidnaping in that the evidence presented at trial did not establish the elements of the crime charged. Respondents argue that petitioner is precluded from raising this claim because he failed to raise the claim in his § 60-1507 motion. Respondents, however, contend that petitioner raised some form of this argument in his direct appeal. (Answer and Return at 10). While the court ultimately finds petitioner did not exhaust his sufficiency of the evidence claim, the court reminds respondents that to properly exhaust a claim before the state courts, a petitioner must raise the claim either on direct review or in a collateral attack. *See Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994) ("The exhaustion requirement is satisfied if the federal issue has been properly presented to the highest state court, either by direct review of the conviction or in a postconviction attack.").

It is well established that prior to bringing a claim before a federal habeas court, a state prisoner must exhaust all state court remedies. 28 U.S.C. § 2254(b)(1)(A). *See also O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) ("Before a federal court may grant habeas relief to a state prisoner, . . . the state prisoner must give the state courts

an opportunity to act on his claims before he presents those claims to the federal courts in a habeas petition.").

To meet the exhaustion requirement, petitioner must have "fairly presented" the claim to the highest state court. *See Picard v. Connor*, 404 U.S. 270, 275 (1971) (opining that to be properly exhausted, a claim must be "fairly presented to the state courts"); *Demarest v. Price*, 130 F.3d 922, 932 (10th Cir. 1997) ("'Fair presentation' of a prisoner's claim to the state courts means that the substance of the claim must be raised there.")

Petitioner's brief to the KCOA on direct appeal presents the following issue to the court: "Whether there was sufficient evidence to support finding Defendant David L. Upchurch guilty beyond a reasonable doubt of the crimes convicted." (Brief of Appellant at 2, *Upchurch*, No. 96-77101-A). The body of petitioner's appellate brief discusses only inconsistencies in the testimony of the victims. Petitioner's brief did not address whether the state proved the elements of kidnaping beyond a reasonable doubt in accordance with Kansas law. *See* Kan. Stat. Ann. §§ 21-3420; 21-3421; *State v. Buggs*, 547 P.2d 720 (Kan. 1976). Consequently, in rejecting petitioner's appeal, the KCOA did not discuss whether the prosecution had proved the elements of kidnaping but only stated that it would not re-weigh the evidence.[2]

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[2] In rejecting petitioner's claim the KCOA stated:

> Upchurch does not dispute the existence of evidence of his guilt, but rather argues that the evidence is inconsistent and the witnesses contradicted each other to the extent that

(Continued on following page)

Because petitioner failed to argue that the evidence presented by the state did not constitute aggravated kidnaping, the Kansas courts were unable to address the issue. *See Smallwood v. Gibson*, 191 F.3d 1257, 1267 (10th Cir. 1999) (holding that petitioner failed to exhaust his ineffective assistance of counsel claim where, although he raised the ineffective assistance of counsel claim before the state court, he based it on different reasons than those expressed in his habeas petition). Therefore, the court finds petitioner's sufficiency of the evidence claim is unexhausted.

Ordinarily, a federal habeas court must dismiss a petition containing an unexhausted claim. *Rose v. Lundy*, 455 U.S. 509 (1982). In this case, however, the unexhausted claim is procedurally defaulted for purposes of federal habeas review. In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court noted that if a petitioner fails "to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would not find the claims procedurally barred," petitioner's claims are procedurally defaulted for purposes of federal habeas review. 501 U.S. at 735 n.1. *See also Dulin v. Cook*, 957 F.2d 758, 759 (10th Cir. 1992) (holding that a petitioner's failure to properly present his claims in state court for exhaustion purposes constitutes "procedural default for the purposes of

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> the evidence was insufficient to conclude guilt beyond a reasonable doubt. What Upchurch is doing is asking this court to reweigh the evidence.

Upchurch, No. 77,101, at 5.

federal habeas review"). Clearly, the time for presenting petitioner's insufficiency of evidence claim to the KCOA has long since passed.

For the court to consider the merits of a procedurally defaulted claim, a petitioner must present both "cause" for the default and "prejudice" flowing therefrom.[3] *See Coleman*, 501 U.S. at 750. Petitioner fails to identify any cause for why he failed to present his claim to the KCOA.[4] With no justification for reaching the claim's merits, the court is compelled to deny petitioner's claim on procedural grounds. All relief will be denied as to this issue.

B. Ineffective Assistance of Trial Counsel

Petitioner claims that his trial attorney provided ineffective assistance of counsel in that counsel failed to argue that the state did not prove the necessary elements of aggravated kidnaping. In assessing petitioner's claim, the court is guided by the familiar two-part analysis of *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner must demonstrate (1) counsel's representation fell

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[3] Petitioner does not argue ineffective assistance of counsel as "cause" for his procedural default. Instead, petitioner makes a separate argument for ineffective assistance of counsel. The court notes that the standard is the same whether petitioner claims ineffective assistance of counsel as cause for a procedural default or whether he claims ineffective assistance of counsel as a separate constitutional claim.

[4] There is a second exception to the procedural default rule, which is also inapplicable in this case. A federal habeas court may reach the merits of a defaulted federal claim when the petitioner demonstrates failure to consider the claim would result in a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750.

below an objective standard of reasonableness and (2) that this deficiency prejudiced petitioner's defense. *See Strickland*, 466 U.S. at 687-88. In making these determinations, the court must "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . . " *Rogers v. United States*, 91 F.3d 1388, 1391-92 (10th Cir. 1996). Additionally, under the second prong of *Strickland*, the court must, "inquire whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (internal citations and quotations omitted).

Petitioner presented this claim to the KCOA in a motion pursuant to § 60-1507. The KCOA found that if trial counsel had argued that the state did not prove the elements of aggravated kidnaping, it would have been inconsistent with the petitioners alibi defense. The court found trial counsel's decision to pursue the alibi defense was "well within the realm of reasonable defense tactics." *Upchurch*, No. 84,059 at 4.

The court's duty, in accordance with the standard of review set forth above, is to determine whether the KCOA unreasonably applied the *Strickland* standard. The court finds the KCOA's conclusion on this matter was a reasonable application of the *Strickland* test and therefore all relief shall be denied.[5]

---

[5] To the extent respondents could have argued that plaintiff's claim of insufficiency of the evidence had not been preserved for appeal thereby making it impossible for appellate counsel to raise the issue on appeal, the court finds that while trial counsel did not make the exact argument petitioner promotes in this collateral attack, trial counsel's

(Continued on following page)

C. Ineffective Assistance of Appellate Counsel

Petitioner contends that his appellate counsel was ineffective for failing to claim on appeal that the evidence presented at trial was insufficient for petitioner's convictions for the aggravated kidnaping of Mr. and Mrs. Green. In assessing petitioner's claim for ineffective assistance of appellate counsel, the court also employs the standards set forth in *Strickland* as discussed in detail above. *See United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995) (stating that although *Strickland* provided the test for determining sufficiency of trial counsel, the same test has been used in evaluating the sufficiency of appellate counsel).

As a starting matter, it is important to note that appellate counsel is not required to raise every non-frivolous argument on appeal. *Cook*, 45 F.3d at 394 (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). However, while it may be acceptable to refrain from pursuing weak claims, "an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a 'dead-bang winner'. . . . " *Cook*, 45 F.3d at 395 (citing *Page v. United States*, 884 F.2d 300, 302 (7th Cir. 1989)). A dead-bang winner as defined by the Tenth Circuit, is an "issue which was obvious from the trial record . . . *and* one which would have resulted in a reversal on appeal." *Cook*, 45 F.3d at 395. Thus, when a petitioner claims his appellate counsel rendered ineffective assistance by failing to raise an issue

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challenge of the sufficiency of the evidence was adequate to preserve the issue for appeal. (Tr. of Post Trial Motions and Sentencing at 9) (defense counsel's argument for a new trial or judgment of acquittal based on insufficiency of the evidence).

on appeal, the court examines the merits of the omitted issue. *Cook*, 45 F.3d at 392.

In Kansas, kidnaping is defined as follows:

> [T]he taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person:
>
> (a) For ransom, or as a shield or hostage;
>
> (b) to facilitate flight or the commission of any crime;
>
> (c) to inflict bodily injury or to terrorize the victim or another; or
>
> (d) to interfere with the performance of any governmental or political function.

Kan Stat. Ann. § 21-3420. Aggravated kidnaping is kidnaping as defined above, "when bodily harm is inflicted upon the person kidnaped." Kan. Stat. Ann. § 21-3421. In this case, the prosecution pursued the aggravated kidnaping charge under Kansas Statutes Annotated § 21-3420(b). The kidnaping, according to the prosecution, was to facilitate the crime of aggravated robbery and aggravated burglary.

In determining whether the taking of an individual was to facilitate the commission of another crime or whether it was merely incidental to the crime charged, the Kansas courts employ the standards set forth in *State v. Buggs*, 547 P.2d 720 (Kan. 1976). According to *Buggs*, to be considered kidnaping, the movement of an individual:

> (a) Must not be slight, inconsequential or merely incidental to the other crime;

(b) Must not be of the kind inherent in the nature of the other crime; and

(c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Id. at 216. Additionally, the word "facilitate," as used in Kansas Statutes Annotated § 21-3420 "'means something more than just to make more convenient.'" *State v. Crane*, 918 P.2d 1256, 1271 (Kan. 1996) (quoting *Buggs*, 547 P.2d at 723). Finally, if the individual was taken to facilitate a crime, the taking must have had "'some significant bearing on making the commission of the crime easier.'" *Id.*

1. Aggravated Kidnaping of Mr. Green

Petitioner first alleges that appellate counsel was ineffective for failing argue on appeal that Mr. Green was not kidnaped as a matter of law pursuant to the *Buggs* test. On the evening in question, Mr. Green was forced to lie on the floor of his home, at gun point, while he was robbed. Petitioner argues that these facts cannot be distinguished from the facts found in *State v. Hays*, 883 P.2d 1093 (Kan. 1994). The *Hays* court, in applying the *Buggs* test, found that when the victim was held against the wall with a crowbar while the defendant broke into her house and robbed her, there was insufficient evidence to support a kidnaping conviction. *Id.* at 1104. The court found the confinement of the victim was incidental to and inherent in the nature of the robbery and the confinement had no significance independent of the robbery. *Id. See also State v. Kemp*, No. 86,279, 2002 WL 940162, at *2 (Kan. Ct. App. May 10, 2002) (published opinion) (finding

confinement was incidental to aggravated robbery where victims were not moved, but held at gunpoint). Petitioner further notes that his co-defendant, Kevin Loggins, had his conviction for the aggravated kidnaping of Mr. Green overturned when the KCOA found this case "virtually indistinguishable" from *Hays*. *See State v. Loggins*, No. 77,106 and 77,107 (Kan. Ct. App. May 8, 1999).[6]

Petitioner argues that the standards set forth in *Buggs* had been available for almost twenty years at the time of his trial. Many of the cases developing the parameters of the *Buggs* test were also readily available to petitioner's counsel. Yet, the transcript of the proceedings in this matter make no mention of the *Buggs* test or whether petitioner's acts constituted kidnaping.[7] Petitioner contends that "counsel was either unaware of what the law is concerning the requirements of kidnaping or failed to understand how that facts in petitioner's case applied to that law." (Traverse at 16). The court agrees with petitioner and finds that the issue was obvious from the

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[6] The KCOA found that because its decision in *Loggins* was unpublished, it was not able to consider the opinion in reference to petitioner's appeal. While an unpublished opinion may not be used to substantiate a point of law, the court finds that the overturning of a co-defendant's conviction on facts exactly the same as petitioner's is relevant in determining whether appellate counsel omitted a dead-bang winner on appeal.

[7] The court recognizes that appellate counsel made a broad sufficiency of the evidence argument on direct appeal. The argument, however, only focused on the conflicting nature of witness testimony and did not mention the *Buggs* test or whether the state had proven the elements of aggravated kidnaping. As mentioned previously, the KCOA refused to reweigh the evidence presented at trial, and dismissed petitioner's claim.

record, and if the KCOA had been properly presented with this issue on appeal, it would have overturned petitioner's conviction for the aggravated kidnaping of Mr. Green. Thus, appellate counsel omitted a dead bang-winner from the appeal. Appellate counsel's failure to raise a dead-bang winner resulted in representation that fell below the objective standard of reasonableness as enunciated in *Strickland*.

Respondents argue, however, that appellate counsel's conduct did not meet the prejudice prong of *Strickland* because even if the court would have overturned petitioner's conviction for the aggravated kidnaping of Mr. Green, the court would not have overturned the aggravated kidnaping conviction for Mrs. Green. In that event, petitioner's sentence would have remained the same because he is serving the sentences for aggravated kidnaping concurrently. Respondents' argument fails because as detailed below, had appellate counsel properly raised the sufficiency of the evidence argument on appeal, petitioner's conviction for the aggravated kidnaping of Mrs. Green would also have been overturned.

2. Aggravated Kidnaping of Mrs. Green

Once again, petitioner contends that appellate counsel should have argued on appeal that the facts presented at trial were insufficient to prove the necessary elements for the aggravated kidnaping of Mrs. Green. Petitioner argues that pursuant to *Buggs*, the movement of Mrs. Green was merely incidental to the crime of aggravated robbery and the movement was not significantly independent of the crime of robbery in that it did not make the robbery either substantially easier or lessen the risk of detection. The

application of the *Buggs* test to facts similar to the case at hand, indicate that petitioner would have been successful had appellate counsel made this argument.

In *Buggs*, the Kansas Supreme Court stated, "[t]he forced direction of a store clerk to cross the store to open a cash register is not a kidnaping; locking him in a cooler to facilitate escape is." 547 P.2d at 731. Further, in *State v. Fisher*, 891 P.2d 1065, 1073 (Kan. 1995), the Kansas Supreme Court held that forcing the owner and an employee of a restaurant to go into the back office to retrieve a key for the safe did not constitute kidnaping, for the movement was considered to be an act of convenience. Because both victims knew where the key was located, it was more convenient for them to retrieve it than for the defendant to look for the key. *Id.* Likewise, Mrs. Green knew where her wallet was located and it was easier for her to locate it than for petitioner to locate it. Thus, the movement of Mrs. Green was merely a matter of convenience for petitioner. Further, petitioner did not take Mrs. Green outside to the car to facilitate escape. If anything, the movement of Mrs. Green increased the likelihood of detection.

Finally, in an opinion recently published by the KCOA, the court reiterated that movement alone does not support a conviction for kidnaping. *Kemp*, 2002 WL 940162, at *2. The *Kemp* case involved a total of six victims. When the defendant and his cohort broke into the victims' home, three of the victims were in a room playing video games, one victim was asleep on the couch, and the remaining two victims arrived at the house after the break-in. One gunman held the three victims in the bedroom at gunpoint while the other gunman escorted the victim who had been sleeping on the couch down the hall

and into the bedroom with the other three victims. When the final victims arrived on the scene,. they were forced down the hallway into a separate bedroom.

The KCOA reversed the defendant's conviction for aggravated kidnaping as to the victims who were initially in the bedroom, finding that the victims confinement was "merely incidental to the attempt to rob them of drugs and money. . . . " *Id.* In overturning the conviction for aggravated kidnaping as to the victim who had been sleeping on the couch, the court found that the mere movement of the victim from the living room to the bedroom did not alone support the charge of kidnaping. The court further found that while confining four victims to one room probably prevented their escape prior to the completion of the robbery, "[m]ost Kansas cases addressing kidnaping charges based on the lessening the risk of detection prong of *Buggs* contain far more compelling facts" including the binding of the victims or movement of the victims to a remote location. *Id.* at *3. Finally, in overturning the defendant's conviction for simple kidnaping in regard to the final two victims, the court found the movement of the victims down the hallway was for no other purpose than to rob them and that the movement was slight, inconsequential and merely incidental to the aggravated robbery. *Id.* *See also Messer v. Roberts*, 74 F.3d 1009, 1014 (10th Cir. 1996) (finding evidence that the victim was beaten in the front of the store and then dragged to the back of the store was insufficient to support a conviction of kidnaping) (applying Kansas law); *Howard v. Nelson*, 980 F. Supp. 381, 385-86 (D. Kan. 1997) (finding sufficient evidence for a conviction of aggravated kidnaping where petitioner used force to restrain the victim's escape including tying her hands together with a shoe lace and holding the victim

by the hair, throat, and arm, enabling the petitioner to sexually assault the victim); *Crane* 918 P.2d at 1273 (finding that the movement of the victim from the front of the store to the back of the store was inconsequential and did not have significance independent of the other crimes charged); *State v. Little*, 994 P.2d 645, 649 (Kan. Ct. App. 1999) (holding evidence was sufficient for kidnaping and aggravated kidnaping where assailant moved victims to separate rooms in the house, bound their hands and feet, and taped their eyes shut).

Based on the Kansas cases cited above, the court finds that appellate counsel's failure to raise the issue of whether the state proved the necessary elements of aggravated kidnaping as to Mrs. Green constituted the omission of a dead-bang winner. Not only was the issue obvious from the record, but if the issue had been raised, it would have resulted in a reversal on appeal.

Counsel's failure to properly raise the sufficiency of the evidence argument as to the convictions for aggravated kidnaping of Mr. and Mrs. Green, fell below an objective standard of reasonableness and clearly resulted in prejudice to petitioner. Had petitioner's convictions for aggravated kidnaping been reversed on appeal, his sentence would have been drastically reduced.[8] The court finds that both prongs of the *Strickland* test have been established, and therefore, a writ of habeas corpus will be issued.

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[8] Petitioner was sentenced to 408 months for each aggravated kidnaping charge. He was sentenced to 184 months for each aggravated robbery charge and 34 months for the aggravated burglary charge.

VI. CONCLUSION

The court finds that petitioner's claim of insufficiency of the evidence is procedurally defaulted. The court further finds that petitioner's trial counsel provided effective assistance of counsel in accordance with the test set forth in *Strickland*. Finally, the court finds petitioner's appellate counsel provided ineffective assistance when counsel failed to raise the issue of whether the evidence presented at trial established that petitioner was guilty for the aggravated kidnaping of Mr. and Mrs. Green.

IT IS THEREFORE BY THIS COURT ORDERED that petitioner's petition for a writ of habeas corpus (Doc. 1) is granted. Petitioner's sentence shall be modified within 120 days in accordance with this order. The Kansas Attorney General's Office shall issue a status report to this court regarding petitioner's sentence modification at the expiration of 120 days.

Dated this 5th day of June, 2002, at Topeka, Kansas.

/s/ Dale E. Saffels
DALE E. SAFFELS
United States District Judge

APPENDIX D

NOT DESIGNATED FOR PUBLICATION

No. 84,059

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

DAVID L. UPCHURCH,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; PAUL W. CLARK, judge. Opinion filed December 22, 2000. Affirmed.

Gary W. Owens, of Law Office of Roger L. Falk, P.A., of Wichita, for appellant.

Charles R. Reimer, assistant district attorney, *Nola Foulston*, district attorney, and *Carla J. Stovall*, attorney general, for appellee.

Before MARQUARDT, P.J., GREEN, J., and BUCHELE, S.J.:

Per Curiam: David L. Upchurch appeals the summary denial of his K.S.A. 60-1507 motion and his motion to alter and amend the judgment. We affirm.

Upchurch filed a 1507 motion on January 25, 1999. He claimed that his trial counsel was ineffective because he failed to: (1) argue that the State did not prove the necessary elements of aggravated burglary; (2) argue that the State did not prove the necessary elements of aggravated

kidnapping; and (3) object to the aggravated burglary charge as being multiplicitous. The motion was denied on March 3, 1999. On March 16, 1999, Upchurch filed a motion to alter or amend the denial of his 1507 motion. A different judge denied Upchurch's motion to alter and amend the judgment as well as the 1507 motion. Upchurch appeals the denial of both motions.

Trial Counsel

On appeal, Upchurch claims that his trial counsel was ineffective because he failed to argue that the State did not prove the necessary elements of aggravated kidnapping.

In order to prevail on an ineffective assistance of counsel claim, defendant must establish that (1) counsel's errors were so serious that the representation was less than that guaranteed by the Sixth Amendment, and (2) that counsel's errors were so serious they deprived defendant of a fair trial. *State v. Sperry*, 267 Kan. 287, 297, 978 P.2d 933 (1999).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Sperry*, 267 Kan. at 298. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *State v. Orr*, 262 Kan. 312, 317, 940 P.2d 42 (1997). If an attorney's conduct was the result of a reasonable defense tactic, then this court will find his or her assistance to have been competent and effective.

See *Crease v. State*, 252 Kan. 326, 337-38, 845 P.2d 27 (1993).

Upchurch's defense to the charges was an alibi. At trial, Upchurch's attorney questioned one of the victim's ability to name Upchurch as the assailant after she provided the police with a general description of her assailant. Trial counsel also informed the jury that the other victim could not pick Upchurch's picture out of a photographic lineup. Finally, and most importantly, Upchurch provided testimony from his girlfriend, who told the jury that Upchurch spent the night in question with her.

It would not have been consistent to present an alibi defense while also claiming that, while Upchurch committed the acts charged, his activities did not amount to aggravated kidnapping.

We believe that the presentation of an alibi defense is well within the realm of reasonable defense tactics. It is not the trial counsel's fault that the jury did not believe the testimony of Upchurch's girlfriend. We find that the trial counsel's performance was not deficient as a matter of law. There is no need for us to reach the issue of prejudice.

Next, Upchurch claims that the photographic lineup was unnecessarily suggestive. Although this issue was raised and decided in Upchurch's direct appeal, he did not raise the issue in his 1507 motion. Issues not raised before the trial court cannot be raised on appeal *Lindsey v. Miami County National Bank*, 267 Kan. 685, 690, 984 P.2d 719 (1999). We do not have jurisdiction to consider this issue on appeal.

Appellate Counsel

Next, Upchurch claims that his appellate counsel was ineffective because she did not argue that Upchurch's actions did not support the charges of aggravated kidnapping as a matter of law. Upchurch believes that the only issues presented to this court for direct appeal were "weak" sufficiency of the evidence arguments based on inconsistencies in trial testimony.

To establish denial of effective assistance of counsel on appeal, a defendant must show that (1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of reasonableness, and (2) the appellant was prejudiced to the extent that a reasonable probability exists that, but for counsel's deficient performance, the appeal would have been successful. *Baker v. State*, 243 Kan. 1, 7, 755 P.2d 493 (1988).

The failure of counsel to raise an issue on appeal is not, per se, ineffective assistance of counsel. *Baker*, 243 Kan. at 9. In an appeal from a criminal conviction, appellate counsel should carefully consider the issues. Conscientious counsel should only raise issues on appeal which, in the exercise of reasonable professional judgment, have merit. *Baker*, 243 Kan. at 10.

In his direct appeal, Upchurch's counsel argued that the trial court erred when it failed to grant his motion to sever his trial from that of his codefendant, the photographic lineup was impermissibly suggestive, he was not given the benefit of a fair and impartial jury, and there was insufficient evidence to support his conviction.

Upchurch now contends that there were other issues which should have been raised. However, the fact that these issues were not submitted to the court on appeal does not render Upchurch's appellate counsel ineffective, even if a codefendant's appeal was successful on a similar issue. The only citation Upchurch provides to support his reasoning is the unpublished opinion in his codefendants' case. Unpublished decisions have no value as precedent and may not be considered by this court. See Supreme Court Rule 7.04 (1999 Kan. Ct. R. Annot. 45).

The sufficiency of the evidence for the defendant's aggravated kidnapping issue was raised and decided in Upchurch's direct appeal. Upchurch has failed to present any evidence that he received ineffective assistance of appellate counsel. Accordingly, we need not consider whether Upchurch was prejudiced by his appellate counsel's representation. We find no error in the trial court's decision.

Denial of Hearing on the K.S.A. 60-1507 Motion

Upchurch also claims that the trial court's decision to deny an evidentiary hearing on his 1507 motion was clearly erroneous.

Unless the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. K.S.A. 60-1507(b). The movant has the burden of establishing the grounds for relief by a preponderance of the evidence. Rule 183(g) (1999 Kan. Ct. R. Annot. 198). On appeal, the standard used to review the

refusal to grant a hearing is whether the trial court abused its discretion. *Estes v. State*, 221 Kan. 412, 414, 559 P.2d 392 (1977).

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAVID L. UPCHURCH,

Petitioner-Appellee,

v.

L. E. BRUCE, Warden, Hutchinson Correctional Facility; CARLA STOVALL, Kansas Attorney General,

Respondents-Appellants.

No. 02-3242

ORDER

Filed July 15, 2003

Before **LUCERO, McWILLIAMS,** and **ANDERSON,** Circuit Judges.

Appellee's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ [Illegible]
Deputy Clerk
